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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. BUB TAHCHAHLAH BAMFORD, Defendant and Appellant.	C079957 (Super. Ct. Nos. 13F2661, 13F2842, & 14F3951)

Defendant Bub Tahchahlah Bamford pleaded no contest to felony driving under the influence (Veh. Code, §§ 23152, subd. (a), 23550.5) with a prior prison term enhancement (Pen. Code, § 667.5, subd. (b))[1] in case No. 13F2842, felony failure to appear (FTA) (§ 1320), subd. (b)) with an on-bail enhancement (§ 12022.1) in case No. 13F2661, and 12 felony FTA counts in case No. 14F3951. The trial court suspended

[1] Undesignated statutory references are to the Penal Code.

imposition of sentence and placed defendant on probation. When probation was later revoked, the trial court sentenced defendant to a six-year eight-month state prison term.

On appeal, defendant contends the on-bail enhancement should have been stricken because the underlying felony was subsequently reduced to a misdemeanor pursuant to section 1170.18. He also contends that those felony FTA offenses based on felonies that were subsequently reduced to misdemeanors pursuant to section 1170.18, should have been reduced to misdemeanors as well. We shall affirm.

BACKGROUND

We dispense with a summary of the facts of defendant's crimes as it is unnecessary to resolve this appeal.

Defendant entered no contest pleas resolving the three cases in three proceedings between July 2, 2014, and July 16, 2014. The felony underlying the on-bail enhancement and felony FTA conviction in case No. 13F2661 was a felony charge for possession of drugs (Health & Saf. Code, § 11377) in case No. 13F2117.[2] The felony underlying three of the felony FTA counts in case No. 13F3951 was the same felony possession of drugs charge from case No. 13F2117. Two other felony FTA convictions in this case were based on felony drug possession charges in case No. 13F2300, and three other felony FTA convictions were based on the felony FTA charge in case No. 13F2661.

Defendant was placed on probation on August 29, 2014. On March 5, 2015, defendant filed section 1170.18 petitions for resentencing as to the felony drug possession convictions in case No. 13F2117 and the felony FTA convictions in case Nos. 13F2661 and 14F3951. On April 13, 2015, the trial court granted the petition as to the

[2] Defendant was convicted by a jury on two felony counts of possession of a controlled substance in case No. 13F2117 at some point before the July 16, 2014, change of plea hearing.

drug possession convictions and reduced them to misdemeanors but denied it as to the felony FTA convictions.

The petition for revocation of defendant's probation was filed on April 6, 2015, and probation was revoked on the same day. Defendant was sentenced to his six-year eight-month state prison term on July 22, 2015.

DISCUSSION[3]

I

Proposition 47, " 'the Safe Neighborhoods and Schools Act' " (Act), which was enacted on November 4, 2014, requires "misdemeanors instead of felonies for nonserious, nonviolent crimes . . . unless the defendant has prior convictions for specified violent or serious crimes." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 70.) Among the affected crimes are various drug possession offenses, including Health and Safety Code section 11377.

The Act also created section 1170.18, which provides in pertinent part: "A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act

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[3] The Supreme Court currently has three separate but related questions pending before it presented by this case: (1) whether Proposition 47 entitles a defendant to vacate a FTA conviction based on a felony charged later redesignated as a misdemeanor (see *People v. Eandi* (2015) 239 Cal.App.4th 801, review granted Nov. 18, 2015, S229305; *People v. Perez* (2015) 239 Cal.App.4th 24, review granted Nov. 18, 2015, S229046); (2) whether Proposition 47 applies retroactively to invalidate a prior prison term based on a felony subsequently reduced to a misdemeanor pursuant to section 1170.18 (see, e.g., *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted April 27, 2016, S233011); and (3) whether a defendant who is entitled under Proposition 47 to redesignate the felony underlying his current sentence and the felony used to enhance that sentence is entitled to have both offenses treated as misdemeanors at the time of the resentencing on the current sentence (see *People v. Buyck*s (2015) 241 Cal.App.4th 519, review granted Jan. 20, 2016, S231765).

that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).) "A felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control a firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (§ 1170.18, subd. (k).)

Application of the on-bail enhancements is contingent on felony conviction in a prior case. Under section 12022.1, "if a person charged with a felony (the primary offense) is released on bail or on his or her own recognizance and subsequently is arrested for committing another felony (the secondary offense) while released from custody on the primary offense, and if that person is convicted of both offenses, he or she 'shall be subject to a penalty enhancement of an additional two years in state prison which shall be served consecutive to any other term imposed by the court.' [Citation.]" (*People v. Walker* (2002) 29 Cal.4th 577, 582, fn. omitted.) While not an element of the enhancement, a felony conviction for the primary offense is an essential prerequisite to its imposition. (*In re Jovan B.* (1993) 6 Cal.4th 801, 814; *In re Ramey* (1999) 70 Cal.App.4th 508, 512.) Reducing the prior felony underlying the enhancements pursuant to section 1170.18 therefore raises issues regarding their ongoing validity.

Defendant contends the plain language of section 1170.18, subdivision (k) prevents imposition of the enhancement after the primary offense is reduced to a misdemeanor pursuant to section 1170.18. He claims this interpretation of section

1170.18 is consistent with the California Supreme Court's interpretation of similar language in section 17 in *People v. Park* (2013) 56 Cal.4th 782 (*Park*).

We begin by noting that section 1170.18 does not apply retroactively. Section 1170.18, subdivision (k) was interpreted in the context of felony jurisdiction over criminal appeals in *People v. Rivera* (2015) 233 Cal.App.4th 1085 (*Rivera*). The Court of Appeal in *Rivera* addressed whether the Act deprived it of jurisdiction in a case where a felony conviction was later designated a misdemeanor under the Act or where the defendant was resentenced as a misdemeanant under the Act. (*Rivera*, at p. 1089.) *Rivera* found that section 1170.18, subdivision (k), which parallels the language from section 17 regarding the reduction of wobblers to misdemeanors,[4] should be interpreted in the same way as being prospective, from that point on, and not for retroactive purposes. (*Rivera*, at p. 1100; see *People v. Moomey* (2011) 194 Cal.App.4th 850, 857 [rejecting assertion that assisting a second degree burglary after the fact does not establish the necessary element of the commission of an underlying felony because the offense is a wobbler: "Even if the perpetrator was subsequently convicted and given a misdemeanor sentence, the misdemeanant status would not be given retroactive effect"].) The court in *Rivera* accordingly concluded that the felony status of an offense charged as a felony did not change after the Act was passed, thereby conferring jurisdiction on the Court of Appeal.[5] (*Rivera*, at pp. 1094-1095, 1099-1101.) We see no reason to depart

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[4] Section 17, subdivision (b) states in pertinent part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶]"

[5] *Rivera* also noted the absence of any evidence that the voters wanted to go beyond directly reducing future and past punishment for convictions under the six included offenses. (*Rivera, supra*, 233 Cal.App.4th at p. 1100 ["Nothing in the text of Proposition 47 or the ballot materials for Proposition 47—including the uncodified portions of the

from *Rivera*. Although *Rivera* addressed section 1170.18, subdivision (k) in a different context, its analysis of subdivision (k) is equally relevant here.

In *Park*, the Supreme Court held that a felony conviction properly reduced to a misdemeanor under section 17, subdivision (b) could not subsequently be used to support an enhancement under section 667, subdivision (a). (*Park*, *supra,* 56 Cal.4th at p. 798.) Since section 1170.18, subdivision (k) contains the identical "misdemeanor for all purposes" language found in section 17, subdivision (b), defendant concludes that there is nothing in Proposition 47 to preclude application of the general rule as stated in *Park*, which require the trial court to permanently stay the section 12022.1 enhancement.

Under *Park*, once a felony is reduced to a misdemeanor, it can no longer serve as the basis for an enhancement of any felony committed after the reduction has occurred. Applying the reduction to eliminate an enhancement would be a retroactive application, which is impermissible under both section 17 and the Act. Although *Park* concerns a different situation, it is instructive because it recognized the distinction between retroactive and prospective application. "There is no dispute that, under the rule in [prior California Supreme Court] cases, [the] defendant would be subject to the section 667[, subdivision] (a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor." (*Park*, *supra*, 56 Cal.4th at p. 802.) Retroactive versus prospective application was also invoked by the Supreme Court in distinguishing cases cited by the Attorney General. "None of the cases relied upon by the Attorney General involves the situation in which the trial court has affirmatively exercised its discretion under section 17[, subdivision] (b) to reduce a

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measure, the official title and summary, the analysis by the legislative analyst, or the arguments in favor or against Proposition 47—contains any indication that Proposition 47 or the language of section 1170.18, subdivision (k) was intended to change preexisting rules regarding appellate jurisdiction"].)

wobbler to a misdemeanor before the defendant committed and was adjudged guilty of a subsequent serious felony offense." (*Id.* at pp. 799-800.)

Defendant admitted to the section 12022.1 enhancement before the felony underlying it was reduced to a misdemeanor. He was convicted of the drug possession that served as the primary offense for the enhancement before he was placed on probation on August 29, 2014. There is no record of an appeal being filed in the case involving the drug possession conviction; it was final before he filed the section 1170.18 petition that reduced it to a misdemeanor. Defendant therefore is asking for a retroactive application of section 1170.18. Following *Rivera* and the Supreme Court's interpretation of the analogous section 17, subdivision (b) in *Park*, we decline to do so.

II

Defendant contends the trial court should have granted his section 1170.18 petition as to his felony FTA convictions that were based on felonies reduced to misdemeanors pursuant to section 1170.18. His claim is based on the "for all purposes" language of section 1170.18, subdivision (k).

Section 1320 reads in full as follows: "(a) Every person who is charged with or convicted of the commission of a misdemeanor who is released from custody on his or her own recognizance and who in order to evade the process of the court willfully fails to appear as required, is guilty of a misdemeanor. It shall be presumed that a defendant who willfully fails to appear within 14 days of the date assigned for his or her appearance intended to evade the process of the court. [¶] (b) Every person who is charged with or convicted of the commission of a felony who is released from custody on his or her own recognizance and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony, and upon conviction shall be punished by a fine not exceeding five thousand dollars ($5,000) or by imprisonment pursuant to subdivision (h) of Section 1170, or in the county jail for not more than one year, or by both that fine and imprisonment. It shall be presumed that a defendant who willfully fails to appear within

14 days of the date assigned for his or her appearance intended to evade the process of the court."

As we have observed before, "[t]he criminal conduct proscribed by section 1320, subdivision (b), is grounded in the violation of a contractual agreement between a defendant and the People . . . ." (*People v. Jenkins* (1983) 146 Cal.App.3d 22, 28.) It is now a specific intent crime (see *People v. Wesley* (1988) 198 Cal.App.3d 519, 522-524 [discussing statutory history]), and a crime of moral turpitude (see *People v. Maestas* (2005) 132 Cal.App.4th 1552, 1556-1557), that is complete when the defendant willfully fails to appear "in order to evade the process of the court." (§ 1320, subds. (a) & (b).)

The severity of a felony FTA is not lessened by the outcome of the underlying charge, because section 1320 applies to persons charged with or convicted of crimes. The "convicted of" language was added to clarify that the statutes applied to persons on-bail postconviction, which had been uncertain before. (See *People v. Jimenez* (1993) 19 Cal.App.4th 1175, 1177-1181 [resolving issue as to section 1320.5 (the on-bail FTA statute)], followed by Stats. 1996, ch. 354, §§ 2-3, pp. 2452-2453 [amending both §§ 1320 & 1320.5 to encompass postconviction FTA].) The usage of "or" unaccompanied by any indication that what follows is qualified, "indicates an intention to use [or] disjunctively so as to designate alternative or separate categories. [Citations.]" (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680.) A defendant is charged with crimes contained in an accusatory pleading, which exists to provide defendant with notice of the charges. (See *People v. Fitzgerald* (1997) 59 Cal.App.4th 932, 936.) Here, the defendant was charged with a felony each time he promised to appear as directed.

Because FTA is premised on defendant's breach of contract (*People v. Jenkins, supra,* 146 Cal.App.3d at p. 28), whether a defendant is convicted of the underlying offense is immaterial to the disposition of the failure to appear charge. (Cf. *People v. Walker, supra,* 29 Cal.4th at p. 583 [it is the legislative view that punishment for jumping bail under § 1320.5 is proper regardless of the disposition of the underlying offense].)

Therefore, defendant could obtain relief if reducing the underlying felony to a misdemeanor applies retroactively to the time defendant committed the felony FTA offense. As discussed in part I, *ante*, section 1170.18, subdivision (k) does not permit this sort of retroactive application of section 1170.18. Defendant's claim is therefore without merit.[6]

DISPOSITION

The judgment is affirmed.

/s/
Blease, Acting P. J.

We concur:

/s/
Butz, J.

/s/
Mauro, J.

[6] This is consistent with other cases addressing punishment based on a defendant's status at the time an act or omission is committed. (See, e.g., *People v. Harty* (1985) 173 Cal.App.3d 493, 499 [construing former § 12021; "the possible invalidity of an underlying prior felony conviction provides no defense to possession of a concealable weapon by a felon"]; *People v. Sanchez* (1989) 211 Cal.App.3d 477, 479-481 [equivalent holding construing former § 12021.1]; *In re Watford* (2010) 186 Cal.App.4th 684, 686 [subsequent invalidation of offense requiring defendant to register as a sex offender does not invalidate his conviction for failing to register].)